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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 699

JOHN A. JOHNSON, PETITIONER,

vs.

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 13, 1938.

CERTIORARI GRANTED FEBRUARY 14, 1938.

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TRANSCRIPT OF RECORD.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 8562.

JOHN A. JOHNSON,
Petitioner, Appellant,
versus

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA,
Respondent, Appellee.

No. 1167 Habeas Corpus.

APPEAL from the District Court of the United States for the Northern District of Georgia, Atlanta Division.

Messrs. Sutherland, Tuttle & Brennan, 1514 First Nat'l. Bank Bldg., Atlanta, Ga., Attorneys for Appellant.

Lawrence S. Camp, Esq., United States Attorney, Atlanta, Ga.,

Harvey H. Tysinger, Esq., Assistant United States Attorney, Atlanta, Ga.,
Attorneys for Appellee.

MOTION TO CONSOLIDATE CASES FOR HEARING AND TO OMIT THE PRINTING OF THE RECORD IN No. 8563.

Filed August 17, 1937.

In the United States Circuit Court of Appeals for the Fifth Circuit.

John A. Johnson
vs. No. 8562.
Fred G. Zerbst.

Monroe C. Bridwell
vs. No. 8563.
Fred G. Zerbst.

Now comes Appellants in the above entitled cases and file their motion for a consolidation of their appeals as follows:

1.

Appellants show that they have both filed separate appeals in this Honorable Court, and that the same are now pending.

2.

Appellants show that they were jointly indicted in the United States District Court in Charleston, South Carolina and they were jointly arraigned, tried and convicted on the 23rd day of January, 1935. The same evidence was used in the conviction of both Appellants.

3.

Appellants show that they filed petitions for the writ of habeas corpus simultaneously to the Court below, which

said Court considered the two petitions together on the same pleadings and on the same evidence. In rendering judgment denying the writ, the Court below consolidated the cases for the purpose of rendering the said judgment and he thus considered the two cases together throughout the proceedings.

4.

Appellants show that both appeals can be properly and adequately considered upon a single record.

Wherefore Appellants respectfully pray that these two cases, to-wit, John A. Johnson v. Fred G. Zerbst, No. 8562, and Monroe C. Bridwell v. Fred G. Zerbst, No. 8563, be heard and decided upon the printed record in the case of Johnson v. Zerbst, and that Appellants be permitted to have the record printed in the Johnson case and be permitted to omit the printing of the record in the Bridwell case, but that separate judgments be entered in the two cases.

(Signed) ELBERT P. TUTTLE,
SUTHERLAND, TUTTLE & BRENNAN,
Attorneys for John A. Johnson and Monroe C. Bridwell.

The foregoing prayer of Appellants is hereby consented to.

(Signed) HARVEY H. TYSINGER,
Asst. United States Attorney.

ORDER.

It is ordered by the Court that the record in only the case of *Johnson v. Zerbst, No. 8562* shall be printed, and that the decision of this Court in said case of *Johnson v.*

Zerbst shall control the decision in the case of *Bridwell v. Zerbst.*

(Signed) RUFUS E. FOSTER,
U. S. Circuit Judge.

New Orleans, La., August 17, 1937.

1a PETITION FOR WRIT OF HABEAS CORPUS.

United States of America in the District Court of the United States, Northern District of Georgia, Atlanta Division.

John A. Johnson, Petitioner,
versus
A. C. Aderhold, Warden, United States Penitentiary, Atlanta, Georgia, Respondent.

No. 1167 Habeas Corpus.

To the Honorable the Judges of the District Court of the United States for the Northern District of Georgia:

The Petition of John A. Johnson, respectfully shows to this Court as follows:

Your Petitioner is actually and unlawfully imprisoned, restrained of his liberty, and detained in the United States Penitentiary, Atlanta, Georgia, under color of authority of the United States, and is in the custody of A. C. Aderhold, Warden of said penitentiary, which is located within the jurisdiction of this Court. The sole claim and authority by virtue of which A. C. Aderhold, so restrains and detains your Petitioner is a commitment of the United States District Court for the Eastern District of South Carolina (hereinafter referred to as the Trial Court) made under the following circumstances:

1. On November 21, 1934, your Petitioner, together with one Monroe C. Bridwell (by whom a similar petition is being filed) was arrested in Charleston, South Carolina, on the charge of possessing and uttering counterfeit money. A preliminary hearing upon such charge was had before the United States Commissioner, after which your Petitioner was bound over by the Commissioner to await the action of the United States Grand Jury, and was confined to jail because of his inability to give bail. Your petitioner was represented by an attorney at the hearing before the United States Commissioner, but upon being informed that your petitioner would be unable to pay him, the attorney withdrew from the case. Your petitioner had at the time, and now has, no property or funds to pay a lawyer to defend or advise him, or to give bail.

2. Upon information and belief: Your Petitioner was indicted by a Grand Jury on January 21, 1935, upon the charge of possessing and uttering counterfeit money. The source of your Petitioner's knowledge and the ground of his belief for this allegation is a statement made to him by the Trial Court when he was arraigned, as hereinafter stated.

3. On January 23, 1935, after having been in jail for two months, your Petitioner was ordered to appear in the Trial Court, when he was for the first time informed that an indictment had been found against him. Without a formal arraignment, he was then asked to enter his plea, and your Petitioner pleaded "Not Guilty."

4. Upon the arraignment referred to in the foregoing paragraph, when your Petitioner pleaded "Not Guilty," the Trial Court asked your Petitioner whether he had an attorney, to which your Petitioner replied in the negative. The Trial Court did not, at this or any other time, offer to appoint an attorney for your Petitioner, or advise your Petitioner that he had a right to have the Court ap-

point an attorney for him. Your Petitioner did not know that he had a right to an attorney, and was not advised thereof until many months thereafter. At no time during the trial, or thereafter until this Court appointed an attorney for your Petitioner as hereinafter stated, did your Petitioner have an attorney to defend or advise him.

5. After your Petitioner had pleaded "Not Guilty," the Trial Court proceeded to impanel the jury. Your Petitioner had no witnesses present and the Trial Court did not ask your Petitioner whether he wished time to prepare his defense or to summon witnesses, nor did the Trial Court advise your Petitioner of his right to compulsory process to secure witnesses. Your Petitioner did not know that he had such a right and, being ignorant, consented that the trial proceed, although he was totally unprepared.

3 6. Your Petitioner on the same day, namely, January 23, 1935, was tried, convicted and sentenced to a term of four years and six months, such sentence being imposed at about 5:30 P. M. During the course of the trial, no objections or exceptions were taken to any of the evidence or any of the proceedings, your Petitioner being unaware of his right to take such objections and exceptions, and no one attempting to preserve any of your Petitioner's rights in his behalf. No witnesses were called on behalf of your Petitioner, except that when your Petitioner testified that he did not know that the bills which he was accused of possessing and uttering were counterfeit, the Trial Court asked him whether he wished a witness called to testify upon this point. Upon your Petitioner replying in the affirmative, a witness was summoned who your Petitioner later learned was a deputy sheriff employed in the office of the Sheriff who caused your Petitioner's arrest, and could not be, and was not, a fair and impartial witness on behalf of your Petitioner. Said deputy sheriff took the witness stand without prior consultation with your Petitioner and testified that he could tell that the bills in question were counterfeit.

7. After your Petitioner had been sentenced, he was remanded to jail where he asked the jailor to call a lawyer for him, but the request was disregarded, and he was not permitted to communicate with a lawyer. Your Petitioner was confined in jail, and held incommunicado from the time he was thus remanded to jail until about 8:00 A. M. on January 25, 1935, when he was transported in an automobile by two United States deputy marshals to the penitentiary in Atlanta, Georgia, where he is now confined. During said trip, he was not allowed to communicate with any one concerning his arrest, trial or legal rights. On arriving in said penitentiary, he was placed in isolation and held incommunicado and was so kept for sixteen days.

8. Your Petitioner is not a resident of the State of South Carolina. At the time of his arrest, he had been in Charleston, South Carolina, only a few days and had no relatives, friends or acquaintances in Charleston. He was a man of little education, having finished only the fifth grade of public school. Your Petitioner has never studied law and is ignorant of the law and has never previously had any Court experience. Your Petitioner did not know of his constitutional rights and did not know that after his trial he had a right to move for a new trial or to appeal and was not at any time informed of these rights until many months after the trial.

9. On May 15, 1935, your Petitioner, having been informed by a fellow prisoner of his right to appeal, filed a petition for appeal, with the assistance of such fellow prisoner, in the office of the Clerk of the Trial Court. On May 20, 1935, your Petitioner was advised by the Clerk of the Trial Court that the appeal could not be allowed because it had been filed too late.

10. In June, 1935, your Petitioner filed a petition in this Court, prepared with the assistance of a fellow

prisoner, for a writ of habeas corpus. This Court allowed such petition, and, learning of the circumstances, appointed Frank A. Doughman, an attorney practicing in Atlanta, Georgia, to represent your Petitioner. On December 19, 1935, this Court denied said petition for habeas corpus, upon the ground that although your Petitioner had been deprived of his right to counsel and of his right to compulsory process to secure witnesses and had thereby been deprived of his liberty without due process of law, the Court had no jurisdiction to order your Petitioner's discharge by a writ of habeas corpus.

11. Your Petitioner is innocent of the offense of which he has been convicted and could have proved his innocence if the Trial Court had appointed an attorney for him to prepare and conduct his defense and had given him a fair trial. Your Petitioner has never been guilty of, and has never before been charged with, any offense.

Your Petitioner alleges that by reason of the foregoing, he was denied the right to counsel for the trial of his case, that he was denied the right of compulsory process to secure witnesses, and that he has been deprived and continues to be deprived of his liberty without due process of law.

Wherefore, your Petitioner prays that a Writ of Habeas Corpus may issue, directed to A. C. Aderhold, Warden of the United States Penitentiary, at Atlanta, Georgia, to bring and have your Petitioner before this Court, at a time to be determined by this Court, together with the true cause of his detention, to the end that due inquiry may be had in the premises, and that this Court may proceed in a summary way to determine the facts and the legality of your Petitioner's imprisonment, restraint and detention, and thereupon to dispose of your Petitioner as law and justice may require.

JOHN A. JOHNSON,
Petitioner.

State of Georgia,
Fulton County, ss.

Personally before me, the undersigned officer authorized by law to administer oaths, appeared John A. Johnson, who being first duly sworn, deposes on oath and says that he has read the foregoing Petition, that he knows the contents thereof, that the statements therein made are true, except as to such matters as are stated upon information and belief, and these he verily believes to be true, to the best of his knowledge, information and belief.

JOHN A. JOHNSON.

Sworn to and subscribed before me, this 28th day of November, 1936.

M. E. ALEXANDER,
Notary Public, State at Large,
(Notarial Seal) Georgia.

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6 ORDER GRANTING WRIT.

Read and considered. Let the writ issue as prayed, returnable before me at Atlanta, Georgia, at 10:00 o'clock a. m., on the 19th day of December, 1936.

This the 16th day of December, 1936.

E. MARVIN UNDERWOOD,
U. S. Judge.

Filed December 16th, 1936.

AMENDMENT TO PETITION.

(Title Omitted.)

Comes now the above named petitioner, with leave of the Court, and amends his petition in the above stated

cause, by striking the name of A. C. Aderhold, Warden, and substituting therefore, Fred G. Zerbst, as Respondent.

SUTHERLAND, TUTTLE & BRENNAN,
Counsel for Petitioner.

ORDER ALLOWING AMENDMENT.

The foregoing amendment to the petition is allowed and ordered filed.

This the 1st day of April, A. D. 1937.
E. MARVIN UNDERWOOD,
U. S. Judge.

Filed April 1st, 1937.

---

7 ANSWER.

(Title Omitted.)

Now comes the respondent in the above entitled proceeding, and in obedience to the writ of habeas corpus, produces the body of the petitioner at the time and place directed therein, and for cause of detention respectfully shows that he holds the petitioner under and by virtue of a warrant of commitment issued by the District Court of the United States for the Eastern District of South Carolina, a copy of which is hereto attached and made a part of this response. For answer to the petition, in corresponding paragraphs, respondent states that:

1.

The allegations of paragraph number one are admitted with the exception of the allegations that petitioner's at-

torney, who represented him before the United States Commissioner, withdrew from the case because petitioner was unable to pay him, and further, that at the time of the trial and at this time, petitioner has no property or funds to pay a lawyer to defend or advise him, or to give bail. For want of sufficient information, these allegations are neither admitted nor denied.

2.

Paragraph two is admitted.

3.

Paragraph three is admitted with the exception that for want of sufficient information, respondent is unable to either admit or deny that upon petitioner's appearance at his trial, he was for the first time informed that an indictment had been found against him; and also with the further exception that respondent denies the allegation that petitioner was asked to enter his plea without a formal arraignment. Respondent says that by the settled definition of the term "arraignment," petitioner was lawfully arraigned in said Court, and that whatever want of formality attended said arraignment did not affect the substance of the arraignment, or render it insufficient in law.

8

4.

For want of sufficient information, respondent neither admits nor denies the allegations of paragraph four. Resonent does deny, however, that any duty rested upon the Court to appoint an attorney to represent petitioner, and that petitioner "had a right to have the Court appoint an attorney for him."

5.

For want of sufficient information, the allegations of paragraph five are neither admitted nor denied. Re-

spondent further adds, however, that during the trial of petitioner, either he or his co-defendant made a suggestion to the Court that he would like to have some expert testimony upon a certain point. Thereupon the Trial Judge sent for a certain qualified witness by the name of Boinset, and adduced his testimony in open Court. Respondent says that other than this witness, no request was made by petitioner or his co-defendant for the production of any other testimony in the case.

6.

Paragraph six is admitted with the exception of the allegation that during the course of petitioner's trial, no objections or exceptions were taken to any of the evidence or any of the proceedings, and for want of sufficient information, respondent is unable to either admit or deny this averment.

7.

For want of sufficient information, respondent is unable to either admit or deny the allegations of paragraph seven except the averment that upon petitioner's arrival at the penitentiary, he was placed in isolation and held incommunicado for sixteen days. Respondent says that it is true that upon arrival in the penitentiary, all convicts are placed in quarantine for several weeks as a precaution against the introduction of disease into the prison, but during this period, the prisoners are idle and not assigned to any work details, and pens, pencils and stationery are available to them, and they come in contact with prison officials more frequently than at any other time in their incarceration, and have more opportunities to make inquiries and ascertain from officers
9 and employees of the penitentiary what their rights may be. The use of the mails and even telegraph facilities are permitted to convicts during this

period, not necessarily as a matter of right, but upon request of the Warden and a showing that it is desired to send a communication in connection with the prisoner's criminal case or an appeal therefrom. Therefore, during the quarantine period, it is possible for a convict to attend to legal matters and handle correspondence pertaining to his case or an appeal therefrom with greater facility than at any other period of his incarceration.

8.

For want of sufficient information, respondent can neither admit nor deny the averments of paragraph eight.

9.

Respondent admits paragraph nine.

10.

Respondent admits paragraph ten.

11.

For want of sufficient information, the averments of paragraph eleven are neither admitted nor denied. Respondent does say, however, that the verdict of the jury finding petitioner guilty creates a presumption that its action was correct, and that petitioner was not innocent of the charge as he claims.

12.

Further answering the allegations of the petition, and particularly the complaint that petitioner was placed on trial "without a formal arraignment," respondent says

that the record of conviction, or judgment roll recites that petitioner waived arraignment and pleaded not guilty on January 23, 1935. Petitioner is therefore, estopped from setting up matter contradicting the record, and said record imports absolute verity until set aside in a direct proceeding for that purpose.

13.

Respondent further states that, in his opinion, considering all the evidence available, neither petitioner nor his co-defendant were so illiterate or of such little learning as to be incapable of conducting a defense of said criminal case. On the contrary, the defense and conduct of the trial was particularly well presented in view of the fact that petitioner and his co-defendant were laymen. The handling of the case showed considerable astuteness and knowledge of Court procedure. Either petitioner or his co-defendant examined witnesses, and according to the best recollection of those available as witnesses, one of said co-defendants addressed the trial jury at the conclusion of the evidence. One of said defendants availed himself of the privilege of testifying in his own behalf, but the other did not. Respondent further says that the District Attorney, out of consideration of lack of counsel on behalf of the said defendants, was unusually diligent to preserve every right, Constitutional or otherwise, of these defendants, and exercised every precaution to prevent an error in the progress of the trial which might be prejudicial to the defendants, even much more so than had they been represented by a lawyer. And respondent further says that so far as he can discover, no error did occur during said trial, and that said criminal trial was fairly and impartially conducted.

14.

Answering the charge that petitioner had no witnesses present at said trial, and that none were called on his

behalf, respondent says that the fact is that no request was made of the Clerk of Court for compulsory process for summoning witnesses, nor to the Trial Judge or prosecuting attorney. Nor was a motion for continuance made until witnesses could be secured by the defense, nor was any claim made to the Trial Court nor is made at this time that there are, in fact, witnesses in existence by whom the innocence of petitioner may be proved.

15.

Answering the complaint that petitioner was somewhat promptly removed from Charleston, South Carolina, to the United States Penitentiary, at Atlanta, Georgia, by two Deputy U. S. Marshals, that he was held incommunicado, that later he learned of his right to appeal, and did file an appeal too late, respondent says that no notice of an appeal was filed with the Clerk of Court as is required by the new rules for taking appeals in
11 criminal cases, nor was any other responsible officer of the Court informed that petitioner wished to appeal his case. Furthermore, there was nothing irregular or unusual in transporting a prisoner to the penitentiary within two days after sentence, and such is the normal and ordinary practice in the Eastern District of South Carolina. The petition does not disclose that petitioner asked anyone for permission to have a consultation with an attorney, or that he objected in any way to a prompt removal to the penitentiary, or that he informed either the Deputy U. S. Marshals or any other officer that he desired transportation to the penitentiary delayed in order that an appeal might be perfected. The appeal which petitioner ultimately attempted to file, having been presented after the expiration of five days from date of sentence, the Trial Court was, therefore, without jurisdiction to entertain the same, and there was nothing to do except to refuse to allow the appeal.

Respondent further says that the facts as set out in the petition wholly fail to constitute a cause of action which

would afford petitioner relief on habeas corpus, and that his only remedy, if he be justly entitled to any, is by way of executive clemency.

Wherefore having fully answered, respondent prays the judgment of the Court in the premises.

LAWRENCE S. CAMP,
United States Attorney.
HARVEY H. TYSINGER,
Assistant U. S. Attorney.

GORDON DEAN,
Special Assistant to the
Attorney General.

State of Georgia,
Fulton County.

Personally before me, the undersigned officer authorized by law to administer oaths, appeared A. C. Aderhold, who being first duly sworn, deposes on oath and says he is Warden of the United States Penitentiary at Atlanta, Georgia, that he is the respondent in the foregoing response, and that the statements therein contained are true to the best of his knowledge, information and belief.

A. C. ADERHOLD.

12 Sworn to and subscribed before me, this 15th day of Jany., 1937.

M. O. HOLLIS,
Notary Public, Georgia, State
(Notarial Seal) at Large.

13 SENTENCE.

District Court of the United States of America, Eastern District of South Carolina.

January Term, 1935.

Present, Hon. Frank K. Myers, District Judge, Presiding.

The United States
vs. 10,249.
John A. Johnson.

Indictment for Vio. Secs. 265 and 550, Title 18, U. S. C.

The sentence of the Court is that the Defendant, John A. Johnson be imprisoned in the U. S. Penitentiary, Atlanta, Ga., for Four (4) Years and Six (6) Months.

FRANK K. MYERS,
U. S. Judge, Eastern District of South Carolina.

R. W. HUTSON,
Clerk, D. C. U. S. Eastern District of South Carolina.

To U. S. Marshal for the Eastern District of South Carolina:

You Are Hereby Commanded to take into custody the Defendant and cause him to undergo the above sentence of the Court.

Witness my hand and seal of the said Court at Charleston, S. C., this 23rd day of January, A. D. 1935.

R. W. HUTSON,
Clerk, D. C. U. S. Eastern District of South Carolina.

I hereby certify that the herein named John A. Johnson entered upon the service of the above sentence this Jan. 23, 1935, in the Charleston County Jail.

WM. BURGUSON,
U. S. Marshal, E. D. S. C.

14 United States Marshal's Office.

Atlanta, Ga., January 25/35.

To Warden United States Penitentiary,
Atlanta, Ga.

Sir:

You will commit the within-named J. A. Johnson, to the Jail of your County and confine him in accordance with the terms of the within sentence of the United States District Court.

WILLIAM F. BURGUSON,
U. S. Marshal Eastern District of South Carolina.

Filed Jan. 16, 1937.

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15 JUDGE'S CERTIFICATE AS TO EVIDENCE.

The United States of America, in the District Court of the United States for the Northern District of Georgia, Atlanta Division.

No. 1167—Habeas Corpus.

John A. Johnson, Petitioner,
vs.
Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, Respondent.

I, E. Marvin Underwood, Judge of said Court, do hereby certify that in the trial of the above said case the evidence was introduced as follows:

First, pleadings which were filed, composed of the petition and response.

Second, stipulation of counsel that this case and the case of Monroe C. Bridwell, No. 1166, are being tried together and that the evidence introduced applies in both cases.

Third, the indictment in the Eastern District of South Carolina in the Federal Court (Exhibit A). Verdict in the same Court (Exhibit B). Sentence in the same Court (Exhibit C). Commitment (Exhibit D).

Fourth, the depositions taken in the Eastern District of South Carolina as follows:

16 Pursuant to a notice to take depositions on behalf of the respondent, dated July 16th, 1935, in both of the above entitled causes, said depositions being taken in accordance with Sections 639 to 641 inclusive, titled U. S. C. A., and the said notice in both causes having been served upon the counsel for the petitioners by Counsel for the respondent on the 16th day of July, 1935, and Counsel for the Petitioners acknowledging service upon said notices and waiving time of service and all other and further service, further consenting that the depositions be taken as to both causes in one set, and be transmitted according to law to the Clerk of the U. S. District Court, Northern District of Georgia, and there be used upon the hearing in the said matter before the Court in both of the above entitled causes.

Now, in accordance with said notices hereto attached, on the 27th day of July, 1935, at 10 o'clock a. m., in the Federal Building at Charleston, S. C., the said depositions were taken before Doris C. Appleby, a Notary Public for South Carolina.

By agreement of Counsel, the hearing was removed from the District Attorney's office to the Court room of said Federal Building.

Appearances:

Frank A. Doughman, Esq., for Petitioners.

H. H. Tysinger, Esq., Assistant U. S. Attorney for the Northern District of Georgia, and H. T. Nichols, Esq., Special Attorney, Department of Justice, for Respondent.

For Respondent.

RICHARD W. HUTSON, being duly sworn deposes and says:

Petitioners' Counsel:

I ask that the customary rule of excluding witnesses be invoked.

Claud N. Sapp, U. S. Attorney for the Eastern District of South Carolina, who is a proposed witness, does not concede that the right to segregate witnesses, as both he and his assistant are government representatives. However, we have no objection to them being segregated. If it is the desire of the respondent, we will be glad to be segregated.

17

Direct Examination.

My name is Richard W. Hutson. I am Clerk of the U. S. District Court for the Eastern District of South Carolina. I was Clerk of the Court in the latter part of 1934 and first part of 1935. I was January 21st and 23rd, 1935. I recall the trial of the cases of U. S. v. Monroe C. Bridwell and John A. Johnson, not in every detail, however. I think I was in the Court room all the time the trial was going on. Our practice in this Court, where a formal arraignment is not had, is to have the defendant sign a plea of not guilty, and the arraignment is not had. That is the usual course in this Court, unless demand is made for formal arraignment, which is seldom, exceed-

ingly rare. The defendants did not make a demand for formal arraignment. The petitioners in this case, Monroe C. Bridwell and John A. Johnson, positively made no demand for any subpoenas for witnesses in their behalf at any time before the trial or at the trial. I have checked in the office and find no request was made for any subpoenas.

Petitioners' Counsel:
I object to anything except what the witness knows of his own knowledge.

There is no record on the criminal docket of the Court showing entry of any subpoenas for witnesses for the defendants, nor did they make demand to me personally. I can't speak with absolute positiveness, but I recall no request at any time at the trial or before the trial of those cases. I cannot say positively, but sometimes the Judge asks the question as to whether the defendants have counsel, and sometimes the Clerk does as a matter of keeping the record straight. I don't recall the defendants requesting Counsel to represent them in the case. I wouldn't say positively the Judge refused Counsel to the defendants.

18

Q. Now, Mr. Clerk, what is the procedure in this Court, and was it applied to the defendants in committing them to the penitentiary after the sentence?
A. The commitment follows as a matter of course after the conviction of the defendant, and is usually issued the same day that the trial was had or a plea of guilty entered. I do not personally make out the commitments. They are made out by a deputy clerk in the office. I looked at the original record this morning, and I find the commitment in the record, in this case. There is no record of an appeal so far as I can find in this case. I have never heard anything about an appeal in this case before. My record shows here they were sentenced the same day, after a verdict of guilty by the jury. These are just my

rough minutes. I didn't hear any statement in open Court then that they wanted to file an appeal. I was there when the verdict was returned. I was in Court when the sentence was pronounced. I was present when these defendants presented themselves in this Court. My recollection is that Johnston conducted the defense for himself. He acted as attorney for himself and Mr. Bridwell and he addressed the jury. I have my notes here. I have it in my notes that he addressed the jury. I don't recall at any time during the trial either of the
19 defendants asking me or the Court in my presence, to have Counsel appointed to represent them. I recollect Mr. Johnson represented himself and his co-defendant. My recollection is that Mr. Johnson conducted his defense about as well as the average layman usually does in cases of a similar nature. The impression made on me was he was conducting the defense for the benefit of both defendants.

(Objection by petitioners' counsel to that question.)

He showed some familiarity with legal procedure in questioning the witnesses. I think he showed some astuteness.

Cross Examination.

I have been Clerk of the Court for thirty-two years. The trial was conducted in this Courtroom, in which this testimony is now being taken. The chair I sat in was on the side of the desk, and from the bench here to the jury box is about eight feet.

20 CLAUD N. SAPP, being duly sworn, testified as follows:

Direct Examination.

My name is Claud N. Sapp. I am United States Attorney for the Eastern District of South Carolina and have

been since July 5th, 1934. As such official of the government, I was in charge of the prosecution of Monroe C. Bridwell and John A. Johnson, who, by the record shown, were prosecuted and convicted in January, 1935. I was in charge of the United States Attorney's office in directing the prosecution at that time. Neither of the defendants asked me at any time to have the Court appoint counsel. The defendants did not at any time during the trial of the case, or before, ask me to have witnesses subpoenaed for them. The defendants plead not guilty when the case was called. They were arraigned in the ordinary manner as other defendants are. They did not insist on a formal arraignment. They signed a plea of not guilty as is the form of this Court with all defendants. I have never seen anyone else arraigned in any different manner. They were simply called to the bar by the Court and asked whether they plead guilty or not guilty. They stated they were not guilty, and then the Court directed the Clerk to have them sign their plea, which they did. The trial then proceeded. The procedure in this Court is that the Clerk has a boy draw the names of the jurors from a hat. He puts his hand in the hat and pulls out a name, and as the names are called out by the Clerk, the juror presents himself. He is first presented to the government, and if the government accepts him, he is presented to the defendant, and the defendant either rejects or accepts him.

21 Yes, and the defendant accepts them or rejects them, separately. They put the names of all the venire in a hat on individual slips, and a young boy six or eight years old, selected by the Clerk, reaches in the hat without looking, pulls out a name, and hands it to the Clerk. The Clerk calls out the name and the juror walks around in front of the Court here, and the Clerk presents him to the government. If the Government objects, of course the jurors is excused. If the government accepts him, he is presented to the defendant. If the defendant accepts him, he is sworn and takes his seat on the panel. That procedure is followed until 12 are selected. After the 12 are selected, the Court then selects one and desig-

nates one of the 12 as foreman of the jury. The Court advised the prisoners as to how many strikes they had. I don't think they struck any jurors. I don't think they objected to any juror. I might possibly be mistaken, but my recollection is they didn't make any objection. At no time did either one of these fellows even suggest that they wanted counsel or witnesses, nor make any such suggestion to the Court. I asked them, the Court asked them, were they ready to go to trial at the time they entered their plea and signed the plea there, and they stated they had been confined in jail here in Charleston for a considerable period. I have forgotten how long. And it was my understanding that they wanted to be tried in order to get out of jail—in order to get whatever punishment they were going to get or go free. It was my understanding from them. They didn't tell me, but that is the information I got. I think Mr. Joe Fromberg, a lawyer of the Charleston Bar, had represented them at some preliminary hearing before the U. S. Commissioner here, and he advised me he didn't represent them further. (Objection.)

I am going to put before the Court or tribunal hearing this case an explanation of my position. The reason that I called Mr. Fromberg, I had been informed that he had previously represented these people. I was not at the Commissioner's hearing. I did not ask Mr. Fromberg about anything that happened at the Commissioner's hearing. I simply say as a matter of courtesy I called him to know if he represented these people, as is my invariable custom. If I think a prisoner has an attorney, I will not try the case without communicating with him. I called Mr. Fromberg to determine whether he represented them at that time. I will state that in the trial of these defendants, I was particular to see that they had a fair and impartial trial in accordance with the rules of evidence and the law applicable to their case, as I understood, it being my custom, where defendants do not have attorneys. (Objection.)

I did in this case because of the fact that they did not have Attorneys, and was particular to see to it that they had a fair trial, as I understood the law to be. In the examination of them, in their cross examination, and in the presentation of the testimony for the government, I didn't introduce or allow anything to be proven that was even questionable under the law, as far as the propriety of the evidence was concerned.

(Counsel for the government in these cases insist that an irregularity is charged by the petitioners as a fact and not an opinion.)

After the defendants were arraigned and on trial they represented themselves. One of the men, Mr. Bridwell, I believe, took active charge of the case and appeared to be very familiar with the law and procedure in the trial of criminal cases. He cross examined the government's witnesses, presented himself to testify, and he represented his co-defendant, Johnson, as I recall. In other words, he took charge of the case, and as I stated, appeared to have some considerable knowledge of the handling of witnesses on the stand. My recollection is that it was Bridwell that had charge of it. Whichever one had been in the marines was the boy that took charge, and he as I recall was named Bridwell. My recollection is both defendants took the stand and testified. The one in charge of the case, when the other was on the stand, his co-defendant, examined him both on direct and re-direct. My recollection is that one of them addressed the jury. However,
as to that I am not right positive. I addressed
23 the jury for the government. I stated that is my
recollection, that one of them addressed the jury. As an attorney, I have been practicing law 25 years. I began the practice of law in I believe June, 1911. As an attorney of that experience, I stated the defendant surprised me with the familiarity that he exhibited with the rules of evidence and procedure in the trial of cases.

As to his being an ignorant man, not versed in any learning at all as alleged in his petition, I consider him a man of extraordinary ability in the handling of his case in the Courtroom if he is not a lawyer. I don't know whether he is a lawyer or not. Neither one of the defendants, nor anyone in their behalf ever mentioned anything to me, or made any request for the subpoenaing of witnesses. The record will show when the Judge pronounced sentence after they were convicted. I don't recall whether it was that same day. As to these men asking me at any time anything in relation to filing an appeal from the verdict of the jury,—judgment of the Court, or at any time sending word to me, or my receiving word from them, or Bridwell and Johnson in person requesting or saying anything to me in connection with an appeal to be taken, I have never heard directly or indirectly one single thing from them since the jury rendered its verdict, until I was requested to come down here to testify. I don't know anything about their commitment and transportation to the Atlanta Penitentiary three days after that. I do not know of my own knowledge about any appeal that they sent over here about May 10th from the Atlanta penitentiary of the case to the Judge of this Court. I heard this morning that they had sent some appeal over and the Judge refused to accept it on the ground that he didn't have jurisdiction. I certainly don't know anything about it other than what I learned this morning by hearsay—that some proposed appeal had been presented to the Judge of this District.

Cross Examination, (Mr. Sapp).

I was appointed U. S. District Attorney and think I was commissioned July 5th, 1934. I had been
24 District Attorney from July 5th until whatever date this trial took place. On January 21st, I was District Attorney at the time this bill of indictment was found. As to notifying these two men, Monroe C.

Bridwell and John A. Johnson, at the county jail that they had been indicted under Section 9265 and 550 of Title 18 U. S. C. A., I will tell you just what I did do. I notified them in this way: Let me explain. It is the custom in this Court, when prisoners are confined in jail and unable to furnish bond, preference is shown to such prisoners in the trial of their cases in order that they might not be left in jail until another term of Court, 3 or 4, or 5 months. I don't know whether that is done in all jurisdictions. I only have charge of this jurisdiction. In this case, I asked these men if they were ready to go to trial.—When they were brought in, I don't know whether it was the 23rd or not. I don't remember whether it was the morning of the 23rd—probably it was. I had never seen these men myself; I never heard of them. Under a comparatively recent statute of the United States, an accused is entitled to a free copy of the indictment, provided he requests it. He did not request it of my office nor from me. He wasn't furnished a copy of the indictment by me because he didn't ask for it. On the morning they were brought here by the Marshal, they weren't placed in the two chairs, beside the jury box, as I recall, until after the trial started, or about the time they were ready for trial. They were in that room outside there probably. When the case was sounded, I simply arose as is the custom and directed the attention of the Court to the case by number, whatever the number was on the docket. I called the attention of the Court to that case and stated that the Government was ready for trial. Judge Myers was on the bench and Clerk Hutson was here. The prisoners were not called here directly before the desk of Mr. Hutson, the Clerk, and asked whether or not they would plead guilty or not guilty. I am going to tell you what happened. They were called up by the Court, and the Court asked them if they were ready to go to trial. They announced "yes." They then came around in front of the bar and the Court asked them if they wanted to plead guilty or not guilty. The Court asked them, as I recall it. I may

be in error about that, but I know the custom is that the Judge does. My recollection is that the Judge asked them. I may be in error. The Clerk may have asked them. However, they were asked and said they wanted to plead not guilty, and the Judge said "Mr. Clerk, take their pleas." And he laid the indictment up and they signed it. *The Judge asked them if they had a lawyer, and they said "no." He asked them if they were ready to go to trial, and they said "yes."* As I recall, the Judge said, "Mr. Clerk, give us a jury." And we proceeded to draw a jury. The Judge asked them within my hearing if they had counsel. With regard to the Court knowing that they had no counsel, he was bound to know it. The case was tried here. The Court did not ask them, these defendants, whether they wanted Counsel. I did not ask them. Absolutely they did not ask me if they might have counsel appointed. As to one of them asking me and my saying that in the State of South Carolina there was no provision made for paying Counsel appointed by the Court, I did not, positively. When the men proceeded to trial, they sat either here, I think, or there, at the end of this table, as I recall it. (Objection.) After the jury had found them guilty, I was present when the Judge passed sentence. I don't recall what time of day it was. Under the rules, they would have had as I understand 5 days, which is a new rule that has been adopted by the Circuit Court of Appeals, in which to have filed an appeal to the Circuit Court of Appeals. The rule speaks for itself. I had knowledge of that rule, being District Attorney. I did not tell either of these men of their rights and I do not know of anybody else who did, I did not tell these defendants about the rule in regard to filing a motion for a new trial three days from date of sentence. I never heard of the men any more from the time they were sentenced. As to my having no recollection of either of them asking me about the subpoenaing of any witnesses, it isn't a question of recollection. I am positive they did not, because I certainly would have had the witnesses subpoenaed

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or done all I could to have them subpoenaed, or postponed trial if these men had requested me to do that. I didn't suggest to the Court, that these men being charged with a crime which might involve a fine of $5,000.00, and imprisonment in the penitentiary for 15 years, that they be appointed Counsel by the Court, and in view of the seriousness of the crime, that they be furnished counsel. The Court took the indictment and read it, every charge in it, to both of the defendants, and asked them did they understand what they were being charged with, and they said they did. The Court, however, read the indictment aloud to them standing up here, and told them of the effect of a conviction on this indictment, and asked them if they understood it, and they said "yes." In addition the Court read aloud the indictment to them so as to acquaint them thoroughly with the charge. The Judge's name is Frank K. Myers. He resides here. I do not know whether he was here yesterday. With regard to seeing him yesterday, I was not here myself. I do not know where he is this morning. I do not know whether he had notice that his testimony was to be taken this morning, since the writ was filed in Atlanta. I haven't seen him, corresponded with him or communicated with him over the telephone since the writ was filed in Atlanta. The last time I saw the Judge was at the law conference in Asheville sometime in the early part of June, when the fourth circuit law conference was held in Asheville. There has been no Court since. (Objection.) As shown by the records, Monroe C. Bridwell filed an appeal in case No. 10249, and it was received in the Clerk's office May 15th, 1935, and a similar appeal was filed by John A. Johnson in the same case on the same day. I have not seen the appeal filed by Monroe C. Bridwell and John A. Johnson. I do not know anything about the letter that was addressed to Mr. Bridwell and the one to Mr. Johnson by the Clerk as follows:

27

"Charleston, S. C., May 20th, 1935.
Mr. Monroe C. Bridwell,
P. O. Box 1733,
Atlanta, Georgia.

Sir:

U. S. v. Monroe C. Bridwell and John A. Johnson, Violation of Sections 265 and 550 of Title 18, U. S. C. A, Indictment 10249. His Honor Frank K. Myers, the presiding Judge of this Court, directs me to write you and acknowledge receipt of your petition for a new trial in this cause, and in the event same is refused, have an allowance of appeal to the U. S. Circuit Court of Appeals, and further to say that the petitions are refused for the reason that the Court is without jurisdiction in the premises."

The date of that letter is May 20th, 1935. I do not know anything about these appeals or this letter. As to having anything to do with the removal of these two accused men so soon from Charleston to the Atlanta penitentiary, so soon after their conviction and sentence, I didn't know anything about it after sentence. I didn't communicate with the Marshal or anything.

Re-Direct Examination, (Mr. Sapp).

I did not ask them or the Marshal, or any officer to hold them here for more than three days. I did not ask them to be sent on in three days. With regard to these men, when they were brought before the bar and before the trial of their cases, ever making a request of me or the Clerk of the Court for a continuance of their cases, as I stated before in my testimony, they stated they were ready to go to trial. Never at any time did they suggest to me that they wanted a continuance. The fact is, my impression was that they wanted to go to trial and get out of jail and get the matter ended—if con-

victed to start serving the time, or if acquitted, to get out of jail In response to the cross examination, my home is not in Charleston, it is in Columbia. The 28 record will show when we had the last term of Courts in this District. The last term we had here was the latter part of May. And that is the reason I haven't seen Judge Frank K. Myers since the law conference. I saw him when we had Court in Charleston, and I saw him in Asheville. With regard to my statement that I didn't know anything about the appeal that was dated May 10th and sent down here on May 20th from Atlanta by these petitioners, my Assistant largely handles the business in Charleston while the Court is not in session. I come here occasionally, as often as necessary when Court is not in session. Ordinary business affairs which do not require my presence my Assistant can handle. In addition to that, I have an office in Columbia which handles war risk insurance cases.

Re-Cross Examination, (Mr. Sapp).

Mr. Shimel told me my testimony was to be taken last Saturday and I prepared to come last Saturday and he phoned me on Friday, I believe, not to come, that it had been postponed until today, and I told him I would be here.

(Mr. Tysinger, of respondent's counsel, stated he wants the record to show, if it does not already show, that the witnesses were excluded over the objection of the witnesses themselves and over the objection of the government.)

(Mr. Sapp then stated that he did not concede the right of Counsel to segregate the witnesses, certainly the U. S. Attorney and the Assistant District Attorney, but we made no objection,—we had no objection to being segregated.)

(Mr. Tysinger then stated that the government does not concede it.)

29 LOUIS M. SHIMEL, being duly sworn, deposes and says:

Direct Examination.

My name is Louis M. Shimel. I am Assistant District Attorney for the Eastern District of South Carolina. As such, I reside in Charleston, S. C. I recall the cases of John A. Johnson and Monroe C. Bridwell that were tried in this Court, as the record shows, for counterfeiting or passing counterfeit money, in January of this year.

I will tell or put on the record just such facts as took place in the conduct of those trials, or that joint trial of both defendants in regard to the regularity of the trial. The defendants had a hearing before the U. S. Commissioner, and they were held by him for the grand jury. The grand jury indicted them, and they were tried by a petit jury and convicted and sentenced. I don't remember the exact date of this trial. It was sometime in January. The hearing before the commissioner was sometime in November, 1934, some two months before the trial here. I was present at the hearing in the Commissioner's Court. The defendants were represented by counsel in the Commissioner's Court. (Objection by petitioner's counsel.)

Their counsel was Joseph Fromberg, Esq. Under the rules in this district, the commissioner does not hear any witnesses for the defense, so they had no witnesses there. Counsel cross-examined the government's witnesses thoroughly. The defendants, of course, both of them were present. I know of no irregularity in the trial in this Court, the joint trial of both defendants, John A. Johnson and Monroe C. Bridwell in the conduct of the U. S. Attorney towards the defendants. Both Mr. Sapp and I were present and participated in the trial of the case.

The defendants did not ask me to have or see about having attorneys appointed for them. They did not ask me or make a request of me, either in person, by letter, or by messenger, or any other way of communication, to have witnesses subpoenaed for them in their behalf. They did not move for a continuance when they were called before the bar on the trial of the cases. In respect to being ready, they were called before the bar and they plead not guilty, and they signed a plea of not guilty and proceeded with the trial of the case. One of the defendants displayed a great knowledge of Court procedure. He cross examined the witnesses, and in my opinion displayed more knowledge than—(Objection by petitioner's counsel.) In my opinion he displayed more knowledge than the normal layman would know of procedure in the trial of cases. He cross-examined the government's witnesses. I don't recall whether he addressed the jury or not. I wouldn't say yes or no, I don't recall it. My impression is that one of the men, the one who had been in the marines,—I think it was Bridwell, talked to the jury, but I am not sure of it, and couldn't swear to it. In regard to the Judge calling them before the bar when their cases were called, as to whether or not they announced they were ready for trial, I don't recall any specific words that were used, but I can say that they did not ask for a continuance. As to explaining to them what they were signing when they were signing their pleas of not guilty, the practice here is the Judge reads the indictment to the defendant, and when he gets through reading the indictment, he asks them how they want to plead, and whichever way they want to plead, the Clerk hands them the indictment and they sign it. I can't remember definitely whether Judge Myers who presided in this case read the indictment to them, but if he didn't it would be a case that was unusual. Normally, the defendants come before the bar and the Judge reads the indictment to them and asks them how they want to plead. I don't recall definitely, but if he had not read it to them, I would have remembered it as a

case of an unusual character. All Judges that I have been before read the indictments, unless counsel announce that they do not want it read. But in this case the Judge would read it to them, because they had no counsel. I do not recall how long the trial lasted.
31 We had quite a number of witnesses that were examined and cross examined, but I don't recall how long the trial lasted. They did not at any time ask my assistance in obtaining witnesses. I recall about a witness that was sent out for by Judge Myers and questioned as to his opinion about counterfeit money. One of the defendants made some suggestion during the trial—I don't recall in what form—that they would like to have someone who was familiar with handling money to say whether or not he could have known when he handled that money that it was counterfeit money. Judge Myers then sent for Mr. Boinest here across the street, who has been in the Sheriff's office for a number of years and handles a good deal of cash collected under tax executions and other executions, and he testified. I do not recall whether the defendant who conducted the trial examined that witness. The witness' testimony as to money was that he said yes that he could have seen that it was not genuine money. (Objection by petitioner's counsel.) I don't know whether I could quote the sixth amendment to the constitution of the United States. I know the effect about compulsory process of witnesses. The constitution gives a defendant a right to have compulsory process for witnesses. I do not know of any personal act of mine in my official capacity, during or before the trial in the way of denying any request of the defendants that would be in violation of the sixth amendment. As for denying them a compulsory process of witnesses, they asked for none.

Cross Examination, (Mr. Shimel).

I pronounce my name Shimel. I have been Assistant District Attorney since 1922. I don't recall whether I was acting before the grand jury at the time the indict-

ment was returned. I drew the indictment. The indictment here shows it was returned January 21st, 1935.
32 It also shows that these men were tried on the 23rd day of January, 1935. When this indictment was returned, I did not furnish these accused with copies of the indictment. As to the law which provides that they shall be, may be furnished free copies of the indictment, that is not what the law provides. It provides that the Clerk of the Court, shall upon the request of the defendant furnish a copy of the indictment. I know nothing about whether the defendants requested a copy of the indictment, when they were brought in for trial on the 23rd day of January. I am assuming that I was present when they were brought in. I don't recall; I assume I was here because I participated in the trial of the case. I wouldn't remember that specific incident. I don't know if the Clerk asked them if they had counsel. I wouldn't say whether or not the Judge asked them if they had counsel. The Judge usually asks defendants whether they have counsel. I don't undertake to say what he did in this particular case. I did not suggest to the Court that in view of the provisions of Article 6, that the defendants should have the assistance of counsel for their defense. I made no suggestion to the Judge. I have explicit confidence in the Judge and his taking care of his own business. The Judge now is on his vacation. He left last Sunday or Monday. The Clerk advises me he left either last Sunday or early Monday morning. I have conducted the correspondence between the District Attorney's office in Atlanta and my office in regard to the taking of these depositions. As to notifying the Judge of the date and time, and of the intention of taking his testimony, I did not notify him of any intention of taking his testimony. The Judge did not feel that he was called upon to have any testimony taken from him. I believe this copy of notice of intention to take depositions is in the file. No. I didn't discuss it with the Judge, that is, the intention of taking

testimony of myself, Mr. Sapp and the Judge. I
33 asked the Judge what he thought of him testifying and he said he was not called upon to give any testimony. As to whether or not that is the reason he took his vacation now, I would rather you ask the Judge that question. As to telling these men after they were convicted on the 23rd day of January, 1935, that they had 3 days under the recent law or rules, rules formulated under recent law, in which they could file a motion for a new trial, what law provides for 3 days?

(Petitioners' counsel then stated: The rules promulgated by the United States Supreme Court based on a recent Act of Congress.)

If you have that rule, show me the rule and I will be able to tell you. I know of no rule which was fixed—(Objection.) What rule is that—about that? There is a rule that within 5 days from the date of conviction a petition for appeal must be made and allowed. I know of no law that requires me to tell defendants of their rights under that rule. I did not do it. I did not facilitate or urge the early removal of these convicted men from the City of Charleston to the penitentiary in Atlanta. I did not have anything to do with that. I am generally familiar with and have seen this petition for appeal filed by Mr. Bridwell and a similar one filed by Mr. Johnson. Now, when I discussed this matter of taking the testimony of myself, Judge Myers, District Attorney and the Clerk, I told Judge Myers that there was suggestion made as to his testifying in the matter of these two writs of habeas corpus, which had been filed in Atlanta by these two inmates of the penitentiary, Mr. Johnson and Mr. Bridwell, and he said he was not called upon to testify. I have had some correspondence with the distinguished gentlemen here from Atlanta representing the District Attorney's office but I don't remember in particular communicating to them that Judge Myers

said he did not feel called upon to testify. I can look at the file and tell you. I want to answer that if Counsel is interested in knowing definitely what I told these
34 distinguished gentlemen in my communication with them, I will be glad to look up the record and so advise him.

RICHARD W. HUTSON, (Recalled):

Cross Examination.

With regard to this paper and recognizing it as a petition for appeal filed by Monroe C. Bridwell, and another by John A. Johnson, I have to be very frank and say I don't think I have ever seen this paper. (Looking on back thereof.) It was filed in my office on May 15th, 1935. As to the other having been filed the same time, I notice the indorsement on the back of the record, clipped together, which seems to be the writing of one of the deputy clerks. Looking at the carbon copy of it and at this at the same time and comparing the textures, they are exactly alike. As to those letters being written at the direction of the Judge, my recollection is now somewhat refreshed. I do recall seeing these papers. That letter was written at the direction of the Judge, as I recall it, yes, sir. I have absolutely not at all discussed with the Judge the matter of taking his testimony and my testimony and the others in this case.

Direct Examination.

(Indicating same papers as above): The date of that letter is May 20th, 1935. My recollection now is that I sent that at the direction of Judge Myers. As to the date of the filing of the paper there, the motion for a new trial or appeal, the papers are clipped together and are filed on May 15th, 1935. With regard to the date of that appeal there, the pauper's affidavit sworn to and signed as to costs on May 10, 1935. The trial was January 21st, 1935. I do not recall receiving any appeal or any letter

from these defendants before that date of when it is filed in regard to an appeal. There was no appeal filed to my knowledge until that one was attempted to be filed after it was too late. In giving me directions to write that letter it was the Judge's impression that the
35 appeal was filed too late under the rules.

Re-Cross Examination.

I see one of the deputy clerks wrote that letter. I didn't discuss it with the Judge myself at any length. I do remember discussing the writing of that letter.

(Mr. Sapp states that he desires to take the stand again.—Objection by petitioner's counsel to Mr. Sapp's taking stand again.)

Mr. Sapp:

The statement I shall make is not based on any testimony, or is not as a result of any testimony taken during my presence, in the latter part of the examination here. The charge, or at least the insinuation is that my office has railroaded these defendants and has not given them a fair trial as provided by the constitution and laws of the government. I want to state, therefore, that if I didn't make clear in my direct examination the reason for these defendants having been tried so quickly after the indictment was found, that my purpose in trying them at that time was not to take away any rights they had or to railroad them, so to speak, in the trial of their case. On the contrary, it was with the intention and for the purpose of giving these defendants every right, that I conceive them to have, by giving them a speedy trial, in view of the fact that they were incarcerated in the jail at Charleston, S. C., and had been so incarcerated for a considerable number of weeks. And as is my invariable custom when the grand jury presents a bill against a man in jail without bond, I have the man brought in and ascertain if he is ready for trial in order that if he is

acquitted he may be relieved of the punishment of being confined in a jail, or if he is convicted he may have credit, at the quickest possible time for the commencement of his sentence. It was for that reason that I called these defendants in, or had them called in, and tried them as quickly as possible after an indictment was found by the Grand Jury. An indictment was found by the
36 Grand Jury sitting at that term of the Court. When the indictment was found, I personally ascertained from these men if they were ready to go to trial. They told me they were. They didn't request any counsel, as I stated before, nor did they ask that any witnesses be subpoenaed. If they had, I would have been glad to give them, as would have been my duty to do, such reasonable time, in the judgment of the Court, as would have been necessary for them to properly prepare their case.

Respondent's Counsel:

The government desires to put into the record, since it was brought forth by Counsel for the petitioners, the purported appeal is in each case, including the petition for appeal, the assignment of errors, the pauper's affidavit in lieu of the payment of costs, showing the dates that it was filed, as the matter was presented by the Counsel for the petitioners on the cross examination of the witnesses in these depositions. This is insisted on to show as a matter of law the lateness in which it was presented and not conforming to the rules when you petition for an appeal, which should be presented to the Court.

37 Fifth, the oral testimony of the following witnesses:

MR. W. J. BENNETT, called by the respondent, testified on oath:

I am county jailer at Charleston, South Carolina, and was county jailer at the same place during the months of

January and February, 1935. I had one deputy and a guard in the day and one deputy and guard at night. Those two men are Bridwell and Johnson, whom I know, and saw in the month of February, 1935, in the Charleston county jail. I saw them frequently after their trial over there in the Eastern District of South Carolina in the Federal Court. They were returned to my jail after their trial. Counsel came to see them before the trial but they made no requests to me to see counsel after the trial. The counsel that came to see them before the trial was Mr. Fromberg, who is now with the Department of Justice in Washington. The prisoners were sentenced on the 23rd day of January, but I don't remember the the date they were removed from the jail. They didn't stay there very long after that, probably five or six days or maybe a week.

I make an inspection of the jail myself. I make a point to go by each cage every day. I passed through the jail on January 23, 24, and 25, 1935. The prisoners made no request to me to be represented by counsel or any request to get in touch with counsel.

On cross-examination, Mr. Bennett testified:

There is one assistant jailer and one guard in the daytime and there is one guard and one assistant jailer in the night. The colored prisoners do the general work around the jail. If a prisoner wants to get in touch with me or one of my assistants, he would pound on a bucket or anything he could get to attract our attention. I didn't know that these men pounded anywhere between twenty-five and thirty times and asked that I send a message into Charleston for them during those two days. I would have heard if they had done this. I don't say
38 I didn't hear them knock. They knock all day long. They were not in a cage by themselves. They were in a cage with several other prisoners. The name of the deputy on duty at that time is J. A. Gleason. Gleason is not here.

MONROE C. BRIDWELL, one of the petitioners, testified, on direct examination, in his own behalf:

I was arrested in Charleston on this charge under which I am now being held on November 20th or 21st around midnight; if it was after midnight, it was the 21st and if it was before midnight, it was the 20th. The hearing was held before the United States Commissioner, and I had a lawyer representing me at that hearing whose name was Mr. Joseph M. Fromberg. As a result of the Commissioner's hearing, I was held over for the Grand Jury. After the hearing, we were carried over to the county jail at Charleston. Mr. Fromberg came over and represented us until he released us by letter on the 14th of January. Trial in this case was the 23rd of January. We did not have any lawyer representing us between the 14th of January and the trial of the 23rd.

I first heard I was indicted the morning of the 23rd. On the morning of the 23rd, I was brought to the Court and someone, I presume it was the clerk, asked how we were pleading and we pleaded not guilty. I signed something, whatever the clerk gave me to sign, and the District Attorney was standing like you were standing and I was standing alone to sign the plea, and I asked, "Could I be represented by counsel?" The District Attorney answered me that in South Carolina counsel was only appointed in the case of capital punishment. The Judge was on the stand at the time that remark was made.

The Judge did not ask me if I had counsel at any time. The clerk asked me if I had counsel and I said no, and asked if I could have counsel. I made the request in an ordinary tone of voice, just like I'm talking now. I don't
39 believe the Judge was engaged in any other business at the time I asked for counsel.

In answer to a question by the Trial Judge, witness replied:

I believe the Trial Judge in my case could have heard my request for counsel. I believe he was looking at me,

but he said nothing. He did not ask whether I wanted counsel and said nothing about counsel at all.

Direct examination continued:

Someone asked me whether I was ready to proceed with the case. I would not be positive who asked. When I was asked this question, I said I guessed I was as ready as I could be. I had been in jail a little over two months at this point. I did not know how long it was until the next term of the Court. I had not been out on bond. I was not able to make bond.

The trial took possibly an hour, possibly an hour and a half. About thirty minutes after the recess, the jury came in. I left the Courthouse about 6:00 o'clock the same evening and was taken to the county jail. All during the day that I was in Court, I had no opportunity to talk to any lawyer about representing me.

When I got back to the county jail, I tried to get in touch with a lawyer. I asked the jailer if he would communicate with a lawyer for me and gave him a lawyer's name which was Major Myers. I asked every jailer there during the next twenty-four hours to get in touch with Mr. Myers for me.

The Trial Judge asked whether the witness had attempted to request counsel of W. J. Bennett. The witness answered that he was not positive whether he had asked Bennett, because during his two months there, he only saw him about three times. He did not believe he had an opportunity of asking Bennett.

On continuation of the direct examination of the same witness, he stated:

I asked for counsel every time there was an opportunity during the day and a half after the trial. Finally I asked for a Western Union boy and a Postal Telegraph boy came. I gave the boy a message and one dollar and asked him to deliver it. The boy was gone about two hours and came back and said he could

not locate the lawyer (Major Myers). I left the jail for the Atlanta penitentiary about 6:00 of the morning of the 25th. Johnson and I and two marshals left by automobile. When we arrived at the Atlanta penitentiary, we checked in, changed all our clothes, took a bath and went to Isolation. The next day, we were carried back to the record office and then carried back to Isolation. Isolation is quarantine. We were segregated from other prisoners.

After I got to the Atlanta penitentiary, I made no further effort to get in touch with a lawyer until I got out of segregation. After I got out of segregation, I asked another prisoner who knew a little something about law what procedure I could take. He said I would have to get the papers from Charleston, South Carolina, and Johnson wrote and got the papers, and they first sent only one indictment. Johnson had to write again to get the other indictment. About May, I wrote and asked for the right to appeal. The Judge wrote back that it was then too late.

I first talked with a lawyer about my situation when I was brought here to this Court. That was after my appeal was denied on account of being too late and after I filed a habeas corpus petition in this Court. Then a lawyer was appointed for me here. I didn't ask any of the officers at the Federal penitentiary to put me in touch with a lawyer or give me an opportunity to consult a lawyer.

I wasn't advised by anyone connected with the prosecution or the Court that I was entitled to a lawyer either at the time of the trial or at any time. I did not state that I wanted to proceed without a lawyer. I didn't have the least idea at all about the time within which I had to file a motion for a new trial or file an appeal after I was convicted. Mr. Fromberg did not represent me at the date of the trial. Mr. Fromberg was retained by me and Johnson the day after we were arrested.
41 Johnson paid him $100.00. He represented us at the hearing before the Commissioner and at

the hearing he would not let us testify. He said we should not testify at all at the Commissioner's hearing. After the Commissioner's hearing, he came to see us two or three times. I told him I didn't have any money at all and that I couldn't get any money. I told him that I was trying to borrow some money but didn't think I would be able to get any. He told me he thought my only chance was to plead guilty and I told him I didn't care to plead guilty, and he said I would have to plead guilty anyway, probably. I told him I wasn't guilty and I would not plead guilty. He said there would be no use for him to represent me if I would not plead guilty and if I could not get any money so I told him I would not have him represent me. Johnson and I wrote him at least two times, I believe three times, asking him to release us from our contract, but he would not release us.

On January 14, Mr. Fromberg actually withdrew from his employment. We were unsuccessful in getting any other lawyer to represent us, though we made every effort to do so.

I was convicted of a charge of passing counterfeit money. I did not know that this money was counterfeit.

I only had an education at a country school where there are no grades. I suppose my education stopped at about the fourth or fifth grade. I was about fifteen years old when I quit school. At the time I was arrested, my home was Brooklyn, New York. I had no friends in Charleston at the time of my arrest.

On cross-examination, the witness testified:

On numerous occasions, I hit the pail against the iron in the jail so the jailer would come and talk to me. I tried to get a lawyer prior to the trial when Mr. Fromberg said he could not represent me any longer unless I wanted to plead guilty. Then I tried to get the jailer to get Mr. Myers to come over to the jail. After
42 I was tried, I spent most of my time trying to get the attention of the jailer in order to secure

a lawyer. Before the trial I didn't spend most of my time trying to get a lawyer, maybe I tried once a week, asking for Mr. Myers to come and see me. I was not in a hurry then, maybe I asked once or twice or three or four times. I went over to the Court on the 23rd. I asked in the Court of anyone in the Court within hearing of my voice if I could have a lawyer. The District Attorney answered me. When I was in the Court, the Clerk told me to sign the indictment and the clerk asked: "Have you got a lawyer?" and I said "No." Then I asked could I have a lawyer appointed to represent me. The District Attorney answered that question. I had not directed the question to the Judge in particular. I had just made a request to anybody within hearing. I did not have opportunity of getting in touch with lawyers at the Court on the day of the trial. I didn't know anybody in the Court room."

The District Attorney said the Eastern District of South Carolina only appointed counsel in capital offense.

I had an opportunity in the first three or four days after my arrival at the Atlanta penitentiary to write letters to the outside. I could get pen, ink, paper and envelopes on Sunday. I arrived two days before Sunday. I didn't know anybody to communicate with on the outside. I knew Major Myers in South Carolina, but my conception of counsel would be to have a counsel in Atlanta. I had never been in Court. I did not make an attempt to reach an attorney. I did not make any attempt to reach the Trial Judge by writing after I arrived at the Atlanta penitentiary. I did not attempt to reach the Clerk of the Court or the United States Attorney or the Judge of this (Northern District of Georgia) district, or the warden of the penitentiary. I attempted to reach an official after my arrival in Atlanta. I wrote the Clerk of the Court in South Carolina, I don't know the date, to get the indictment papers. I made no attempt to follow up the letter I wrote to the Clerk of the District Court in South Carolina. I didn't know who to get in touch with.

43 I didn't get up in Court and say I wanted counsel because I had been in the Marine Corps eleven years when I was arrested. The Marine Corps is a very strict military organization where you only speak when you are spoken to. That is one reason I didn't get up in Court and say I wanted counsel. It is a matter of training. When I was told something in Court I thought that was final and that I had no right to go further in the matter.

I was in the Marine Corps at the time of my arrest in South Carolina. My rank was corporal in the Marines. I had eleven years of consecutive service and I had an excellent record at all times.

I tried to speak to the jury after the evidence was in during my trial over in the Eastern District of South Carolina. I told the jury, "I don't consider myself a hoodlum as the District Attorney has made me out several times. I told the jury that I was not a native of New York as the District Attorney stated, but was from Mississippi and only stationed for Government service in New York. I only said fifteen or twenty words. I said I didn't think I was a hoodlum and could not have been one of very long standing because they didn't keep them in the Marine Corps.

I objected to one witness' testimony. I didn't ask him any questions, I only objected to his whole testimony. After the prosecuting attorney was finished with the witness, he said, "Your witness," and I got up and objected to the testimony on the grounds that it was all false, and the Trial Judge said any objection I had I would have to bring proof or disproof.

I asked if I could get witnesses. I made the request on the day of the trial of the District Attorney. I didn't ask the Judge to subpoena any witnesses. I asked the District Attorney in the Court room and he said it was too late. I asked the District Attorney in the presence of the Judge.

A witness was brought in that they said I requested, though I did not request that witness. The question was

whether I could tell or whether any ordinary
44 person could tell whether money was counterfeit, and I said I did not believe an ordinary person not used to handling money any more than I was could tell it was counterfeit, and the District Attorney said, "We'll settle that, if you have no objection, and pick somebody up and put him on the stand and see." I said, "I have no objection." They put a man on the stand, but I did not ask for the witness they put on the stand. I made a suggestion to the District Attorney and he said he would get a witness.

After I got to Atlanta, I wrote to my wife. I did not write to anyone else immediately after I got to Atlanta. During the first two weeks, I'm not sure, but I don't believe I wrote to anyone else. I didn't write to any lawyer within the first two weeks after arriving in the Atlanta penitentiary in order to get out. I wanted to find out a little first.

On re-direct examination, the witness said:

I did not have a chance to speak to the witness who was put on the stand for me by the District Attorney. I did not know who he was. Since the trial, I have learned he was a deputy sheriff or tax collector. I supposed he was accustomed to handling money. I did not know him, by name, when he was brought into the Court room. I did not know who was going to be called. I did not know anything about my rights to subpoena witnesses on my behalf. Mr. Fromberg, while he was still my lawyer, told me that any witnesses I had would have to be paid for by me. Some of the prisoners in the jail told me I would have to get witnesses who would have to be paid for by the Government, but when I asked the District Attorney over at the trial, he said it was too late. The District Attorney told me it was too late after I had said I was ready for trial. This was after the trial had started. Nobody told me that I had a right to have witnesses brought in without expense to me before the trial began.

45 On re-cross examination, the witness testified:

I was in the marines eleven years. I am not familiar with Court martial law. It was not required reading for one to be familiar with Court martial. I attended one Court martial. There was counsel at the Court martial proceeding for the party involved because no one comes to trial in the service without counsel. In the service, you are not allowed to go to trial without counsel. You don't have to ask for him since he is appointed.

On re-direct examination, the witness testified:

Johnson was tried at the same time I was tried. He made no argument to the jury. He did not examine any witnesses.

The Trial Judge asked if the witness maintained the entire innocence of the offense charged. The witness answered in the affirmative.

JOHN A. JOHNSON was called and testified, in his own behalf, as follows:

I did not know that the money I passed was not genuine. I have had fifth grade schooling. At the time I was arrested, I had been living in New York. I was then in the service. I had never had any legal training. I was in jail all the time prior to the trial. I first learned that an indictment had been returned against me on the day we were tried, the 23rd of January. I only learned I had been indicted on the morning they brought me into Court. I had no contacts in Charleston other than those Bridwell had. Everything Bridwell testified to about Mr. Fromberg and Mr. Myers related to me as well.

On the morning of the 23rd about 8:00 or 9:00, two marshals came to the jail and took us to the post-office to the Court room. I assumed that we were to be indicted

before a grand jury. I found out from the talk of the two marshals that we were going to be tried. Then they asked us how we were going to plead and we
46 pleaded not guilty. The Clerk said to Bridwell "You have not counsel?" and he said, "No," and he asked for counsel and the District Attorney answered and said they did not appoint counsel in South Carolina. I told the two marshals there that it looked to me like we could have the trial continued and put off a few days until we could make arrangements. They said we could not do that and one of them said something to the District Attorney and the Judge overheard what he said and the Judge said "It is too late now. We will go on with the trial." The Judge said that and the Judge must certainly have heard Mr. Bridwell's statements because the Judge seemed to be alert. I heard Bridwell's statement about wanting counsel. I heard the District Attorney reply. I stated a moment ago what the District Attorney said.

Nobody told me about my right to have witnesses subpoenaed upon my behalf. I did not know that I had a right to have witnesses subpoenaed without expense to me. I didn't know anything about my right to have a continuance of the trial.

I made an effort continuously after the trial to get a lawyer while we were in Charleston. I saw the man who testified this morning on behalf of the Government (Mr. Bennett). I saw him when he came through his office to go on up to the jail coming back from the trial. I did not see him upstairs in the jail. I asked to see the man in charge of the jail. I saw Mr. Bennett's son at the door of our cell and we told him a number of times that we wanted a lawyer brought. I believe it was his son, I never knew for sure. After we got back from the trial, I got the impression from the other inmates there that you could not write anything out in a letter about your case. I was under the impression during the first week or two after I arrived in the Atlanta penitentiary that I did not have a right to write out about our case. No one in connection with the enforcement of the rules of the peni-

tentiary told me that I couldn't write out, but other fellows who had been there longer than I had
47 said you couldn't write out about your case. That was the impression I got from the other prisoners.

On cross examination, the witness testified:

I wrote letters out of the Atlanta penitentiary during the first two or three weeks. I wrote to a friend. I arrived one week and the following week I wrote a letter. I wrote other letters after that. I did not write to any lawyers or any judges or public officials, until I wrote to the Clerk of the South Carolina District Court in May. No prison officials told me that I couldn't write out. The inmates gave me that impression. I had pen and ink and paper to write but I did not attempt to write. Bridwell was talking for me when he said we have no money to employ counsel. I did not make any such statement.

The first notice I had of any charge against me was on January 23rd. I knew I was being held in jail on a counterfeiting charge, but I did not expect any trial. I thought I would be released when the grand jury met. I knew that there would be some sort of determination of whether I would be charged, but I didn't know that we had already been indicted.

On re-direct examination, the witness stated:

I didn't know what the Court proceedings would be before we were turned loose, but I was told that when the Court met that would be the end of it, and I was thinking that if I was not guilty I would be turned loose. That's all I knew about it. I didn't know an indictment had already been returned against me when I went to Court.

I maintained that I was innocent at the time of the trial and now maintain that I am wholly innocent of the offense charged.

Respondent thereupon called B. F. BATES, who testified:

I am the Record Clerk at the United States Penitentiary in Atlanta and was Record Clerk in January of 1935. All prisoners received by the penitentiary are re-
48 ceived under a uniform procedure. The receiving officer may be one of three receivers. When the prisoner is delivered, the official receives the Court papers and the prisoner is given a number. Then he is assigned to a cell. First, the prisoner is quarantined as to health or dangerous disease. I have a record of all incoming and outgoing letters. I have a record of all the letters which were sent out by the petitioners, Bridwell and Johnson. In the record of Bridwell, the first letter he wrote was to his wife in Brooklyn, New York. This letter passed through the mail office February 1st. Bridwell sent a letter to his wife on the 1st, 5th, and again on the 9th and again on the 16th and again on the 23rd of February. On March 30th, the record shows a letter to Mr. Fromberg, a letter on the 13th of May to Frank R. Myers, Jr., Charleston, South Carolina. The letters sent out in the month of March were to his wife on the 5th, 9th, and 14th, 17th, 23rd and 29th; one to Mr. W. F. Hall at Brooklyn, New York, on the 2nd of March; one to Mr. Fromberg on the 30th. In April he sent out seven letters. In May the record indicates a letter to Judge Myers, the Trial Judge.

Johnson's record indicates that the first letter he sent was to Miss E. Thomas, Cumberland, Maryland, on the 28th of February, and subsequent letters to the same person on the 7th, 14th, 16th, 17th, 25th of February. On the 27th of February, the record indicates he wrote to the Clerk of the Court at Charleston, South Carolina. In the month of March, Johnson wrote Miss E. Thomas on the 4th, 10th, 15th, 17th, 23rd, and 28th, and to the Clerk of Court on the 5th and on the 14th.

On cross examination, the witness stated that his record indicated there were no other letters mailed during the months in question.

On re-direct examination, the witness testified:

All prisoners pass through the Clerk's office as soon after they were received as the Clerk can get to them. Those prisoners were received on the 25th day of
49 January and were examined in his office on the next day. The examination consisted of an identification examination. I don't know at what hour the prisoners were received on the 25th.

On cross examination, the witness testified:

I make up the records to show when the prisoners are entitled to be released on "good time." These prisoners are entitled to be released in July, 1938. Mr. Bridwell was granted parole, effective April 23, 1937.

In rebuttal, attorney for the petitioner recalled MONROE C. BRIDWELL, who testified as follows:

I wrote a letter to Mr. Fromberg after I arrived at the Atlanta penitentiary. I wrote him and asked him to mail me my military discharge which he had in his possession. I had given him this military discharge when I retained him and I wrote and asked him to send it to me and that I would pay all the expenses. He never answered me. Finally, I asked the Social Service officer at the prison to write him and the Social Service officer received a letter that I would get my papers some time. I have never gotten them.

d pleadings and oral testimony and documentary
nce are hereby settled as the evidence in the said

s August 13, 1937.

E. MARVIN UNDERWOOD,
United States Judge.

e foregoing is a true and correct summary of the
nce introduced at this trial.

HARVEY H. TYSINGER,
Asst. United States Attorney,
SUTHERLAND, TUTTLE &
BRENNAN,
By ELBERT P. TUTTLE.

ed Aug. 14, 1937.

EXHIBIT A.

United States of America,
ern District of South Carolina,
ne District Court,
rleston Division.

1st Count, Vio. Secs. 265 and 550, Title 18 USC.

a stated term of the District Court of the United
es for the Eastern District of South Carolina, begun
holden at Charleston, within and for the District
esaid, on the third Monday of January, in the year
ur Lord one thousand nine hundred and thirty five,
Grand Jurors of the United States of America, within
for the District aforesaid, upon their oaths respective-
lo present, that Monroe C. Bridwell and John A.
nson, late of Charleston, in the County of Charleston,
he State of South Carolina, hereinafter called the
ndants, on the twenty first day of November, in the

year of our Lord one thousand nine hundred and thirty four, at Charleston, in the County of Charleston, in the State aforesaid, in the aforesaid Division and District, and within the jurisdiction of this Court, with intent to defraud the United States of America, one Wilma Blair and other persons to the Grand Jurors aforesaid unknown, did unlawfully, knowingly, wilfully and feloniously, pass, utter and publish and cause to be passed, uttered and published, and did aid, abet, counsel, command, induce and procure the uttering and publishing as genuine certain falsely made, forged and counterfeited obligations and securities of the United States; that is to say, the said defendants did, at the aforesaid time and place, pass, utter and publish as genuine and cause the passing, uttering and publishing as genuine, and did aid, abet, counsel, command, induce and procure the passing, uttering and publishing as genuine, and did deliver and cause to be delivered to the said Wilma Blair four (4) counterfeited Twenty Dollar ($20.00) Federal Reserve Bank Notes purported to have been issued and circulated by and under the authority of the United States of America, * * *

2nd Count, Vio. Sec. 265, Title 18 USC.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that Monroi C. Bridwell and John A. Johnson, late of Charleston, in the County of Charleston, in the State of South Carolina, hereinafter called the defendants, on the twenty first day of November, in the year of our Lord one thousand nine hundred and thirty four, at Charleston, in the County of Charleston, in the State aforesaid, in the aforesaid Division and District, and within the jurisdiction of this Court, with intent to defraud the United States of America, one Wilma Blair and other persons to the Grand Jurors aforesaid unknown, did unlawfully, knowingly, wilfully and feloniously, have in their possession certain falsely made, forged and counterfeited obligations and securities of

the United States, to-wit, twenty one (21) counterfeited Federal Reserve Bank Notes, purported to have been issued and circulated by and under the authority of the United States of America, * * * contrary to the form of the Statute of the United States in such case made and provided, and against the peace and dignity of the United States.

(Sgd.) CLAUD N. SAPP,
United States Attorney.

EXHIBIT B.

Verdict.

We, the Jury, find the defendants guilty this 23 day of Jan., 1935.

M. T. EVANS, Foreman.

51 EXHIBIT C.

District Court of the United States of America, Eastern District of South Carolina, January Term, 1935.

Present, Hon. Frank K. Myers, District Judge, Presiding.

The United States,
vs.
John A. Johnson.

Indictment for Vio. Secs. 265 and 559, Title 18, USC.

Sentence.

The sentence of the Court is that the defendant John A. Johnson be imprisoned in the U. S. Penitentiary, Atlanta, Ga., for Four (4) years and Six (6) months.

FRANK K. MYERS,
U. S. Judge, Eastern District of South Carolina.

R. W. HUTSON,
Clerk, D. C. U. S., Eastern District of South Carolina.

EXHIBIT D.

To U. S. Marshal for the Eastern District of South Carolina:

You are hereby Commanded to take into custody the Defendant ..... and cause him to undergo the above sentence of the Court.

Witness my hand and seal of the said Court at Charleston, S. C., this 23rd day of January, A. D. 1935.

R. W. HUTSON,
Clerk, D. C. U. S., Eastern District of South Carolina.

I hereby certify and return that I have this date placed the within named John A. Johnson in the United States Penitentiary.

WILLIAM F. BURGSSON,
Marshal,
J. F. MARTSCHINK, Deputy.

ORDER DISCHARGING WRIT AND REMANDING PETITIONER.

52, (Title Omitted.)

The above case came on regularly for trial and was heard and considered.

Petitioner had a former writ of habeas corpus in this Court involving the same questions, but this second writ was allowed due to the peculiar circumstances surrounding the case, and the desire of the Court to afford opportunity to present any additional facts and views which petitioner desired to present.

Upon consideration of the case, however, I find that it does not substantially differ from the one heretofore

decided by this Court (Johnson v. Aderhold, Warden, 13 Fed. Supp. 253), and for the reasons stated in the decision in that case, it is:

Ordered and Adjudged that the writ of habeas corpus be and same hereby is discharged and petitioner remanded to the custody of respondent.

This April 3rd, 1937.

E. MARVIN UNDERWOOD,
United States District Judge.

Filed April 3rd, 1937.

PETITION FOR REMOVAL.

(Title Omitted.)

To the Honorable, the Judges of the United States District Court for the Northern District of Georgia, Atlanta Division:

Now comes the petitioner, John A. Johnson, by Sutherland, Tuttle & Brennan, his attorneys, feeling himself aggrieved by an order made on the 3rd day of April, 1937, discharging the writ of habeas corpus heretofore filed and allowed herein, and remanding him to the custody of the Warden of the United States Penitentiary at Atlanta, Georgia, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit, and respectfully shows that in and by said order manifest error was committed for the reasons specified
53 in the assignment of errors which is filed herein, and prays for an order allowing petitioner to prosecute said appeal, and that a transcript of record, papers and proceedings upon which said order was made may be duly authenticated and sent to the United States

Circuit Court of Appeals for the Fifth Circuit, and that a citation be issued as provided by law.

Dated, Atlanta, Georgia, July 2, 1937.

ELBERT P. TUTTLE,
SUTHERLAND, TUTTLE & BRENNAN,
Attorneys for Petitioner.

Filed July 2, 1937.

ORDER GRANTING APPEAL.

It is Ordered that the appeal, as above prayed for, be allowed and that the transcript of record, papers and proceedings herein be duly authenticated and sent to the United States Circuit Court of Appeals for the Fifth Circuit.

Dated July 2nd, 1937.

E. MARVIN UNDERWOOD,
U. S. D. J.

Filed July 2, 1937.

ASSIGNMENTS OF ERROR.

(Title Omitted.)

Now comes the petitioner-appellant above named and files the following assignment of errors upon which he will rely upon his prosecution of an appeal from the order of this Court made herein on the 3rd day of April, 1937.

First: The United States District Court for the Northern District of Georgia erred in discharging the writ of habeas corpus theretofore allowed herein.

54 Second: The District Court erred in refusing to hold that the trial and conviction of your petitioner were null and void under the due process clause of the Fifth Amendment to the Constitution of the United States.

Third: The District Court erred in refusing to hold that the trial and conviction of your petitioner were null and void because your petitioner was deprived of the assistance of counsel for his defense and of the right to have compulsory process for obtaining witnesses in his favor as guaranteed him by the Sixth Amendment to the Constitution of the United States.

Fourth: The District Court erred in refusing to hold that the circumstances subsequent to the trial and conviction of your petitioner amounted to a deprivation of the right to make a motion for a new trial and to take an appeal from such judgment of conviction.

Fifth: The District Court erred in refusing to hold that the deprivation to your petitioner of the right to have counsel for his defense in violation of the Sixth Amendment and of the due process clause of the Fifth Amendment to the Constitution of the United States did not deprive your petitioner of the right to present a motion for a new trial and to take an appeal.

Sixth: The District Court erred in holding that your petitioner, subsequent to his trial and conviction and within the time permitted to move for a new trial and to appeal, had an opportunity to move for a new trial or to take an appeal.

Seventh: The District Court erred in holding that, although your petitioner had by his trial and conviction been deprived of his liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States, the District Court did not have jurisdiction or power to discharge your petitioner upon a writ of habeas corpus.

Eighth: The District Court erred in holding that, although your petitioner had by his trial and conviction, been deprived of his liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States, there was no ground for discharge of your petitioner upon a writ of habeas corpus.

55 Ninth: The District Court erred in holding that, although your petitioner had, by his trial and conviction, been deprived of the assistance of counsel for his defense and of the right to have compulsory process for obtaining witnesses in his favor as guaranteed by the Sixth Amendment to the Constitution of the United States, the District Court did not have power or jurisdiction to discharge your petitioner upon a writ of habeas corpus.

Tenth: The District Court erred in holding that, although your petitioner had, by his trial and conviction, been deprived of the assistance of counsel for his defense and of the right to have compulsory process for obtaining witnesses in his favor as guaranteed him by the Sixth Amendment to the Constitution of the United States, there was no ground for discharge of your petitioner upon a writ of habeas corpus.

Eleventh: The District Court erred in not holding that the answer of the United States to the writ of habeas corpus was insufficient in law.

Wherefore, your petitioner prays that said order be reversed and that such other and further orders, directions and decrees be made as shall be in accordance with law.

ELBERT P. TUTTLE,
SUTHERLAND, TUTTLE & BRENNAN,
Attorneys for Petitioner.

Filed July 2, 1937.

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56 BOND.

Know all Men by these Presents, that we, John A. Johnson, as principal, and The Aetna Casualty and Surety Company, as sureties, are held and firmly bound unto Fred G. Zerbst, Warden, in the full and just sum of Two Hundred Fifty Dollars to be paid to the said Fred G. Zerbst and his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 2nd day of July, in the year of our Lord one thousand nine hundred and thirty-seven.

Whereas, lately at a hearing in a suit depending in said Court, between John A. Johnson and Fred G. Zerbst, Warden, an order and judgment was rendered against the said John A. Johnson and the said John A. Johnson having obtained an appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the order and judgment in the aforesaid suit, and a citation directed to the said Fred G. Zerbst citing and admonishing him to be and appear before the United States Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

Now, the Condition of the above Obligation is such, that if the said John A. Johnson shall prosecute said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN A. JOHNSON, (Seal)
By ELBERT P. TUTTLE, (Seal)
Atty. at Law.
THE AETNA CASUALTY AND
(Corp. Seal) SURETY COMPANY,
By FAIR DODD,
Resident Vice President.

Attest:
DONALD D. BOLTON,
Resident Assistant Secretary.

Sealed and delivered in presence of—
.....
.....

Approved by—
E. MARVIN UNDERWOOD,
U. S. Judge.

Filed July 2, 1937.

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57 PRAECIPE.

(Title Omitted.)

To the Honorable Clerk of the above Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in

such transcript the following, and no other, papers and exhibits, to-wit:

(1) The Petition.

(2) The Response.

(3) The Statement of Evidence.

(4) Petition for appeal and order.

(5) Assignments of error.

(6) This praecipe and service thereon.

The said transcript to be prepared as required by law and to be filed in the office of the Clerk of the Circuit Court of Appeals at New Orleans, on or before the 31st day of July, 1937.

ELBERT P. TUTTLE,
SUTHERLAND, TUTTLE & BRENNAN,
Attorneys for Appellant.

Service of the above praecipe accepted this 2nd day of July, 1937.

A. SIDNEY CAMP,
Assistant United States Attorney.

Filed July 2, 1937.

58 CLERK'S CERTIFICATE.

United States of America,
Northern District of Georgia. ss.

I, J. D. STEWARD, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 57 pages contains a true, full, complete and correct copy of the original record, assignments of error and all proceedings had in the matter of John A. Johnson, Petitioner, Appellant, versus Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, Respondent, Appellee, as specified in the praecipe of counsel herein and as the same remains of record and on file in the clerk's office of the said District Court, at Atlanta, Georgia, except that the original citation with acknowledgment of service thereon is included herein in the stead of a copy thereof.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the said District Court, at Atlanta, Georgia, this the 14th day of Aug., A. D. 1937.

J. D. STEWARD,
(Seal) Clerk, United States District Court, Northern District of Georgia,
By C. A. McGREW, Deputy Clerk.

Original citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the United States Circuit Court of Appeals.

* * * * * * * *

[fol. 65] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of October 6th, 1937

No. 8562

JOHN A. JOHNSON

versus

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia

On this day this cause was called, and, after argument by Elbert P. Tuttle, Esq., for appellant, and Bates Booth, Esq., Special Assistant to the Attorney General, for appellee, was submitted to the Court.

[fol. 66] OPINION OF THE COURT—Filed November 24, 1937

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8562

JOHN A. JOHNSON, Appellant,

versus

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia, Appellee

No. 8563

MONROE C. BRIDWELL, Appellant,

versus

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia, Appellee

Appeals from the District Court of the United States for the Northern District of Georgia

(November 24, 1937)

Before Foster, Sibley and Holmes, Circuit Judges

FOSTER, Circuit Judge:

These cases present appeals from judgments dismissing petitions for writs of habeas corpus to release appellants

[fol. 67] from the Atlanta penitentiary. The evidence is identical in both cases. By agreement only one record was printed, upon which both cases were submitted. The record discloses the following facts.

Appellants were arrested in Charleston, South Carolina, on November 21, 1934, charged with feloniously uttering and passing four counterfeit $20.00 Federal Reserve notes and with knowingly and feloniously possessing 21 counterfeit Federal Reserve Bank notes, with intent to defraud. A hearing was had before a United States commissioner, at which they were represented by counsel of their own choosing. They were bound over to await the action of the United States grand jury and, being unable to give bail, were confined in a local jail. An indictment was returned against them at the next term of court and on January 23, 1935, they were brought into court, pleaded not guilty and were tried to a jury, with the result that a verdict of guilty was rendered. They were sentenced to be imprisoned in the Atlanta penitentiary for four years and six months. No appeal was taken from this judgment. In December, 1935, they filed petitions in the United States District Court for the Northern District of Georgia, seeking release on habeas corpus. The petitions alleged that the judgment of conviction was an absolute nullity, on the grounds that they were innocent of the charge and were denied compulsory process for obtaining witnesses in their favor and to have the assistance of counsel for their defense, in violation of the 6th Amendment; and were therefore denied due process of law, in violation of the 5th Amendment. The District Court appointed competent counsel to represent them on the trial of the habeas corpus cases and evidence was taken on the hearing. The District Court reached the conclusion that they had been deprived of constitutional rights as alleged but that, as the trial court had jurisdiction and the judge was [fol. 68] not prejudiced nor swayed by any improper influence, the judgment was not void and the errors and irregularities complained of could be corrected only on appeal. Bridwell vs. Aderhold, 13 F. Supp. 253. No appeal was taken from these judgments. However, in December, 1936, the applications for release on habeas corpus were renewed on the same grounds. The District Court again appointed competent counsel to represent appellants on the second trial before him and they were represented by competent counsel on this appeal.

There is some conflict in the evidence appearing in the record but the following facts may be considered as proved with reasonable certainty. When appellants were brought into the District Court in South Carolina the indictment was read to them and they signed pleas of not guilty. They were asked by the judge if they were represented by counsel and replied "no", and were then asked by him if they were ready for trial and replied "yes". They did not request the judge to appoint counsel for them, he did not do so of his own motion and they were not represented by counsel at the trial.

Appellants are white men and were both in the service of the United States in the Marine Corps. Bridwell had had eleven years continuous service and was a corporal. The term of service of Johnson is not shown. Bridwell had attended a country school until he was 15 years of age. Johnson had had fifth grade education. During the trial Bridwell assumed charge of the defense for both appellants, cross examined government witnesses, took the stand in his own defense, and at the close of the case addressed the jury. Johnson did not testify. There was evidence tending to show that Bridwell conducted the defense very well for a layman and showed some familiarity with legal procedure. During the trial Bridwell stated that he did not think that [fol. 69] men of such limited knowledge as appellants would know counterfeit money when they saw it and asked that a witness be called to establish whether the money was counterfeit. The District Attorney procured a witness, who was a deputy sheriff in charge of tax collections and handled considerable money in performing his duties. He testified that the money was counterfeit and that that fact was readily discernible. Bridwell had objected to the testimony of other witnesses but no objection was made to the introduction of this witness nor to his testimony.

Bridwell testified the attorney who represented them before the commissioner continued to represent them until some time in January and was paid $100 for his services; that he released them because they would not follow his advice to plead guilty and they had no more money to pay him; that before the trial they made efforts to secure another lawyer, naming him, but were unable to get in touch with him because they were in jail. Bridwell also testified, and this was corroborated by Johnson, that, in the presence

of the judge, he asked the United States Attorney if he could be represented by counsel and was told by him that in South Carolina counsel was not appointed by the court except in capital cases. He then asked if he could have witnesses subpoenaed and he was told by the United States Attorney that it was too late. The United States Attorney, his assistant and the clerk of the court, who were present at the time, denied that Bridwell made inquiry as to securing either counsel or witnesses and denied that the United States Attorney made the statements attributed to him. Appellants further testified they did not know and were not advised of their right to ask for a new trial or take an appeal until after they had been removed to the penitentiary when they were told by a fellow prisoner. With his assistance they prepared an application for appeal but the trial judge declined [fol. 70] to allow it on the ground that it came too late and he was without jurisdiction. There is no doubt that the time for an appeal had elapsed under the criminal appeals rules.

Appellants rely upon the cases of Downer vs. Dunaway, 53 F. (2d) 586, and Powell vs. Alabama, 287 U. S. 45. In Downer vs. Dunaway we reversed a judgment of the District Court dismissing an application for habeas corpus without a hearing. The defendant was a Negro charged with raping a white woman. The trial was conducted immediately after the crime was alleged to have been committed and under pressure of such great public feeling against the prisoner that the militia had to be called out to protect him during the trial. While the defendant was represented by counsel until the verdict was rendered, counsel did nothing to perfect an appeal to the Supreme Court of Georgia. The fact that the accused was not represented by counsel at a crucial time was not entirely the basis of our decision. We concluded that, assuming the allegations of the petition to be true, the trial was dominated by the mob so as to deprive defendant of due process of law.

Powell vs. Alabama went up on writ of certiorari to the Supreme Court of Alabama and was not decided on application for habeas corpus. In that case the defendants were also Negroes charged with raping white women. The danger of lynching was imminent and it was necessary to call out the militia to protect the prisoners during the trial, which was held immediately after they were arrested. The defendants were not represented by counsel. It was held

that in the circumstances attending the trial, considering the youth, ignorance and illiteracy of the defendants, it was the duty of the court to appoint counsel to aid them in the preparation of their defense and in the trial of the case, whether requested or not. We do not consider these cases [fol. 71] controlling as applied to the facts in the cases at bar.

It has been repeatedly held that the writ of habeas corpus may not be substituted for a writ of error or an appeal. If the trial court had jurisdiction, it is only in extraordinary cases, where the circumstances surrounding the trial make it a sham and a pretense, that the writ will lie on the ground that the judgment is a nullity for want of due process of law, even though it be alleged the accused has been denied rights guaranteed by the Constitution. Riddle vs. Dyche, 262 U. S. 333; Goto vs. Lane, 265 U. S. 393. The cases at bar do not present extraordinary features. Appellants were not immature and had sufficient education to understand the charge against them. There was no undue haste in bringing them to trial, there was no popular feeling against them and the trial was quiet and orderly. They had over two months in which to procure counsel or to seek advice from their friends. The presiding judge was not prejudieed against them. There is no showing that there were any witnesses they desired to have summoned to give testimony in their favor. They had the right of appeal and the reasons for their not doing so are immaterial. They did not request the trial judge to appoint counsel for them. Perhaps it would have been better if he had done so of his own motion, but we are not advised of any decision of a court of last resort, state or federal, holding that in a non capital case he was bound to do so. In fact, a number of decisions to the contrary, which we need not review, are cited by counsel for the United States. In Powell vs. Alabama the decision was that counsel should have been appointed in that case but the court expressly refrained from deciding whether that rule should obtain in all cases.

Due process of law does not absolutely require that the defendant in every criminal case be represented by coun- [fol. 72] sel. He may expressly or impliedly waive his right and suffer no wrong. When a defendant is without counsel the judge usually protects his rights. It is not suggested that in these cases the evidence was insufficient to support the conviction.

The judgments dismissing the petitions were right. They are Affirmed.

[fol. 73] JUDGMENT

Extract from the Minutes of November 24, 1937

No. 8562

JOHN A. JOHNSON

versus

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court dismissing the petition in this cause be, and the same is hereby, affirmed.

[fol. 74] MOTION AND ORDER STAYING MANDATE—Filed December 14, 1937

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8562

JOHN A. JOHNSON, Appellant,

vs.

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia, Appellee,

and

No. 8563

MONROE C. BRIDWELL, Appellant,

vs.

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia, Appellee

Now Come John A. Johnson and Monroe C. Bridwell, the appellants in the above entitled causes, which were

heard together and in which a single opinion was written, and show to this Court that they intend to apply to the Supreme Court of the United States for a writ of certiorari to review the judgments rendered by this Court, and that they intend to make said application within thirty (30) days after the time when the mandate of this Court would normally issue under Rule XXXII.

[fol. 75] Wherefore, appellants pray that the mandate of this Court be stayed and withheld until January 14, 1938, or in the event that a petition for certiorari is filed and dismissed in the Supreme Court prior to the expiration of said time, then until final disposition of the said causes in the Supreme Court.

This 13th day of December, 1937.

(Signed) Elbert P. Tuttle, Sutherland, Tuttle & Brennan, Attorneys for Appellants.

[fol. 76] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 8562

JOHN A. JOHNSON, Appellant,

versus

FRED G. ZERBST, Warden, United States Penitentiary, Atlanta, Georgia, Appellee

On Consideration of the Application of the appellant in the above numbered and entitled cause for a stay of the mandate of this court therein to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered

that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 14th day of December, 1937.

(Signed) Rufus E. Foster, United States Circuit Judge.

[fol. 77] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 65 to 76 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8562, wherein John A. Johnson is appellant, and Fred G. Zerbst, Warden, United States Penitentiary, Atlanta, Georgia, is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 64 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 14th day of December, A. D. 1937.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 78] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 14, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.